

APPEAL NO. 042070
FILED OCTOBER 7, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 26, 2004. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 40%. The appellant (carrier) appealed, arguing that the hearing officer's determination is against the great weight and preponderance of the evidence. The claimant responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that the Texas Workers' Compensation Commission (Commission)-appointed designated doctor is Dr. F; and that the claimant reached maximum medical improvement on February 4, 2004. At issue was the claimant's IR. Section 408.125(c) provides that where there is a dispute as to the IR, the report of the designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. See *also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002.

The carrier contends that the designated doctor misapplied the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) by assessing an IR of 40% because the designated doctor's report does not indicate that radiculopathy was present in the cervical or lumbar spine. The carrier contends that the designated doctor assessed a 40% IR because he felt constrained to follow Commission Advisory 2003-10, signed July 25, 2003, and Advisory 2003-10B, signed February 25, 2003. In the instant case, the designated doctor stated in his letter of clarification that he referenced the AMA Guides as well as Commission Advisories 2003-10 and 2003-10B and assessed a 40% IR, based on a 25% impairment under Diagnosis-Related Estimate (DRE) Cervicothoracic Spine Impairment Category IV and a 20% impairment under DRE Lumbrosacral Spine Impairment Category IV. We have previously held that with regard to hearings conducted after July 22, 2003, involving IRs for spinal surgery which would be affected by Advisory 2003-10, it is error not to consider and apply that advisory. Texas Workers' Compensation Commission Appeal No. 032399, decided November 3, 2003. Whether the Commission exceeded its authority in issuing Advisory 2003-10 is a matter for the courts. See Texas Workers' Compensation Commission Appeal No. 031441, decided July 23, 2003.

The hearing officer found that the designated doctor's report and letter of clarification were not contrary to the great weight of the other medical evidence. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In this case, we are satisfied that the hearing officer's IR determination is sufficiently supported by the evidence.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701-3403.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Gary L. Kilgore
Appeals Judge